LODE LOCATIONS: A SPECIFIC QUESTION OF EXTRALATERAL RIGHTS AND A GENERAL THEORY OF INTRALIMITAL RIGHTS.

I. A Question concerning the Extralateral Rights Incident to Ownership of a Junior Lode Location which partly Overlaps a Senior Lode Location.

May the lines of a junior lode location be laid across the surface of a valid senior lode location for the purpose of securing to the junior locator apex rights on so much of the vein as apexes within the lines so laid, excepting only where a conflict arises with the apex rights of the senior locator?

Since the decision of the Del Monte case,[1] it has been very generally, but not universally, considered by mining lawyers that this question may be answered affirmatively.

The facts in the Del Monte case are illustrated by the plat on page 267.

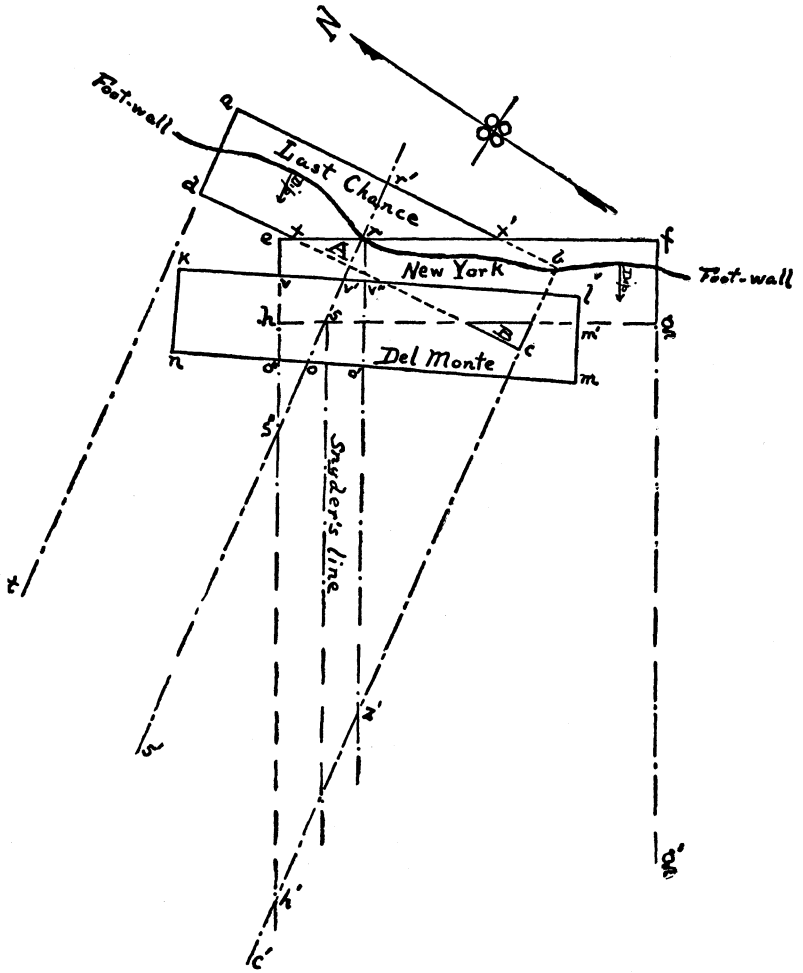
The three locations shown on the plat were all patented. Both as to time of location and as to time of patent, the order of seniority was Del Monte, New York, Last Chance. The triangle B, however, notwithstanding the seniority of Del Monte as to location, was, by express agreement with the owner of the Del Monte, patented to the owner of the Last Chance.

The owner of the Del Monte, though holding the oldest of the three locations, could not, of course, since the location included no part of the apex of the vein within its boundaries,[2] have any right

[1] Del Monte M. & M. Co. *v.* Last Chance M. Co., 171 U. S. 55.

[2] The vein was a broad lode. In Del Monte M. & M. Co. *v.* New York & L. C. Co., 66 Fed. 212, it was claimed that the hanging wall lay within the Del Monte territory. The court said: "In the present inquiry the outcrop of the lode will be taken to be . . . on the line of the foot-wall as shown on the diagram" (p. 213). Lindley (pp. 993–994) states: "The case involving the extralateral right of the Last Chance as against the Del Monte [Del Monte M. & M. Co. *v.* Last Chance M. Co.] was presented to the circuit court of appeals upon an agreement of counsel that the course of the foot-wall as marked in the diagram . . . should for the purposes of the case be deemed to be the course of the apex." For broad lode questions, see Lindley, Mines, § 583; Snyder, Mines, § 803.

to such of the ore as lay between the dip-right bounding planes of the owner of either of the two junior locations on the apex. The owner of the Del Monte, however, did have — in accordance with that doctrine which is not capable of logical establishment, but which is enunciated by most jurists as elementary — a common



law right to such of the ore as lay within imaginary vertical planes drawn through the boundaries of the location, wherever such ore was not subject to the apex rights, if any, incident to the ownership of either of the locations on the apex.

Two actions were brought by the Del Monte Mining and Milling Company in protest against the extraction of ore from under its

surface by one or the other of the owners of the junior locations. The first action involved the apex rights, if any, incident to the ownership of the New York only. The second action involved the apex rights, if any, incident to the ownership of the Last Chance only. These two actions, therefore, may be distinguished, for brevity, by calling the first Del Monte *v.* New York, and by calling the second Del Monte *v.* Last Chance. Del Monte *v.* New York[3] was not appealed from the Circuit Court; Del Monte *v.* Last Chance[4] was taken up to the Supreme Court, and is now commonly known as the Del Monte case.

In Del Monte *v.* New York it was held that the line r–z' must be drawn, parallel with the end lines of the New York, from the point of departure of the vein from the easterly side line of the New York, and that the apex rights of the owner of the New York, as against the owner of the Del Monte, must be bounded on the north by such line, the court saying:[5] "Following the course of the end lines of the New York location in a westerly direction from this point [r], there is a considerable space [the triangle z'–r–s'], which widens in the westward course between the line last mentioned (r–z') and the north compromise line [r–s', practically]. To this respondent is not entitled, as against complainant, the owner of the Del Monte claim. So much of the territory last mentioned [the triangle z'–r–s'] as lies west of the east side line of the Del Monte location [i. e., v'–v''–o'–o] is subject to the prayer . . . As to the territory south of that last mentioned [*i. e.*, south of the line r–z'], the motion [that is, the motion for an injunction restraining the owner of the New York from extracting ore from under the surface of the Del Monte] will be denied."[6]

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[3] Del Monte M. & M. Co. *v.* New York & L. C. Co., 66 Fed. 212.

[4] Del Monte M. &. M. Co. *v.* Last Chance M. Co., 171 U. S. 55.

[5] P. 215.

[6] The question as to the extralateral rights of the owner of the New York, though general in form, and without specific reference to the New York, was nevertheless certified to the court in the Del Monte case (see question 4, 171 U. S. 60), and was considered and answered. The question referred to was as to the extralateral rights, in general, of any locator whose vein passes through one end line and one side line of his location, and the court decided that, in such case, the extralateral rights must be limited by a line parallel with the end lines, drawn from the point where the vein crosses the side line. In so deciding, the court merely followed the well-settled rules evolved from the principles discussed in the King *v.* Amy, 9 Mont. 543, rev'd 152 U. S. 222, Tyler *v.* Last Chance, 71 Fed. 848, and Fitzgerald *v.* Clark, 17 Mont. 100, and many other cases to the effect that though the true end lines of a location, irrespective of how they are called by the locator, are the lines crossed by the apex, yet that not every line which is crossed by an apex is an end line; that when two lines are crossed by an apex they may

In Del Monte *v.* Last Chance (the Del Monte case) the court expressly decided that the owner of the Last Chance had extra-

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both be considered to be end lines only if they are opposite to each other; that if the apex crosses one end line and one side line of a location, the line designated by the locator as an end line will be held to be the true end line, and an imaginary line parallel with such end line will be drawn from the point at which the apex crosses the side line; and that vertical planes drawn through such parallel lines, and extended indefinitely across the opposite side line, will bound the territory within which the locator may pursue the vein inside and outside the boundaries of his location. Thus the Supreme Court held in effect, in the Del Monte case, as the Circuit Court had previously held in fact, in Del Monte *v.* New York, that the extralateral rights of the New York must be limited on the north by the line *r–z′*, parallel with the end lines, drawn from *r*, the point of departure of the apex from the side line (pp. 86–91).

On page 85 of the opinion, however, the court seems to intimate that the New York had extralateral rights as far north as the line *e–h′*. The expressions of the court, in this regard, are as follows: "It is obvious that the line *e h*, the end line of the New York claim, extended downward into the earth will at a certain distance pass to the south of the line *r s*, and a triangle of the vein will be formed between the two lines, which does not pass to the owners of the New York." Lindley, 1057–1058, explaining this reference to the line *e–h′* as the northerly boundary of the extralateral rights of the owner of the New York, states that the court meant the line *e–h′* applied at *r*, "making the line *r–z–z′*." The court in the Copper Trust case, 65 Pac. 1024, considered that the court in the Del Monte case, in stating its reasons for refusing to consider the extent of the extralateral rights of the owner of the Last Chance, merely mentioned the line *e–h′* as being a line to the north of which the owner of the New York could have no rights "under any circumstances." At any rate, in view of the positive holding of the court on the general question of extralateral rights incident to ownership of a location like the New York, the somewhat careless reference to the line *e–h′* must be disregarded.

Snyder, however, takes the expressions on page 85 of the opinion literally. He states (p. 705): "The New York was not a party to that litigation, and of course its rights were not determined, though they were incidentally referred to, such reference, however, not being necessary to a decision of the questions before the court. In discussing the possible rights of the Last Chance to pursue the vein on its dip at any point south of the projected line *r s*, the court speaks of the vein south of the line *e h*, projected beyond its intersection with *r s*, as the property of the New York, but there is no warrant in law for any such right north of point *x* [that is, the point *s* on our plat], for want of an apex. Whether the court will adhere strictly to this dictum," etc. In the first place, a glance at the plat will show that if the apex rights of the owner of the New York had extended as far north as the line *e-h′*, such rights might well have been considered by the court in its determination as to whether or not the owner of the Last Chance had rights, under the surface of the Del Monte, everywhere north of the line *r–s′*. Furthermore, if it were granted that a question as to the extralateral rights of the New York called for a judicial expression of opinion on a point not necessary to the determination of the point in issue, and that the court might therefore have refused to answer it [as it did with respect to the question as to whether or not the Last Chance had extralateral rights to the south of the line *r–s′* (see *infra*)], still it is doubtful that any holding concerning the extralateral rights of the owner of the New York, since the court was not considering the case on its merits (it expressly refused so to do, pp. 91–92), but was merely answering a question certified to it by the court below, can properly be characterized as a dictum. Finally, it may be said that Snyder, in considering the expressions on page 85 of the opinion to be a holding to the effect that the northerly

lateral rights north of the line *r*–*s*'.[7] The court, however, refused expressly to decide, one way or the other, as to whether or not the owner of the Last Chance had extralateral rights to the south of the line *r*–*s*', saying: "The portion of the vein in controversy is that lying under the surface of the Del Monte claim and between two vertical planes, one drawn through the north end line of the

boundary of the extralateral rights of the owner of the New York was the line *e*–*h*', overlooks the decision of the court as to the extralateral rights incident to the ownership of a location like the New York, which definitely fixed the northerly boundary of the extralateral rights of the owner of the New York as the line *r*–*z*'. However, having reached the erroneous conclusion that the court had fixed said boundary as the line *e*–*h*', and being fearful lest this supposed holding be adhered to in subsequent adjudications, Snyder laboriously, and in contravention of the well-settled rules established by the decisions above cited, constructs a line from the point *s*, parallel with the end lines, as the most northerly line which it is possible to establish as a boundary of the extralateral rights of the owner of New York. It is to be noted that this line is actually farther north than the line really established by the court criticized, and by the court in Del Monte *v.* New York. Snyder suggests his line under the doctrine of a "judicial apex." Beyond the point *s*, he says (p. 705), "there is no warrant in law" for any extralateral right, "for want of an apex, or anything that may be called an apex." It is hard to understand what there is that may be called an apex north of the line drawn from *r*, but not north of the line drawn from *s*. It is hard to understand, further, whence comes any "warrant in law" for the line drawn from *s*. It may be added that the term "judicial apex" is very differently used by Lindley as a synonym for true or judicially determined apex (index, p. 2002, and § 310), and that apparently there is no such doctrine as Snyder's judicial apex doctrine recognized, or even mentioned, by the courts.

The "theoretical" or "legal" apex doctrine doubtingly discussed by Lindley (§ 312 a) is not similar to Snyder's "judicial" apex doctrine. The former is merely an effort to create an imaginary apex where the true apex has not been, and cannot be, located under the lode mining laws — it seeks to give extralateral rights where otherwise there would be none, because of the impossibility of locating the true apex. The latter doctrine, on the other hand, is an effort to create an imaginary apex where the true apex has already been located under the lode mining laws — it seeks to give double extralateral rights, or extralateral rights in two different directions from one and the same apex. In other words, Snyder's "judicial" apex doctrine seeks to give to one who has not located, and who is not the owner of, a given portion of an apex, an extralateral right which can be properly based only on a location of, and ownership of, such portion of the apex. It seeks to give to A extralateral rights referable to a portion of an apex which is not included within A's territory, notwithstanding that such portion of the apex has already been located by B, simply because B follows his dip rights in a direction different from that which would have been followed by A had he located the portion of the apex in question. For the invention of this legal curiosity by Snyder we are indebted to the ambiguity of the expressions used by the court in the Del Monte case, and it may be added that this subject is of peculiar interest in this discussion because the reasoning followed by Snyder in evolving his "judicial apex" doctrine was clearly a development of, and is not logically to be differentiated from, the reasoning of those who hold that a junior locator may lay his end lines upon a senior surface for the purpose of securing to himself extralateral rights with reference to a portion of the apex which has already been previously located.

[7] Pp. 69–85.

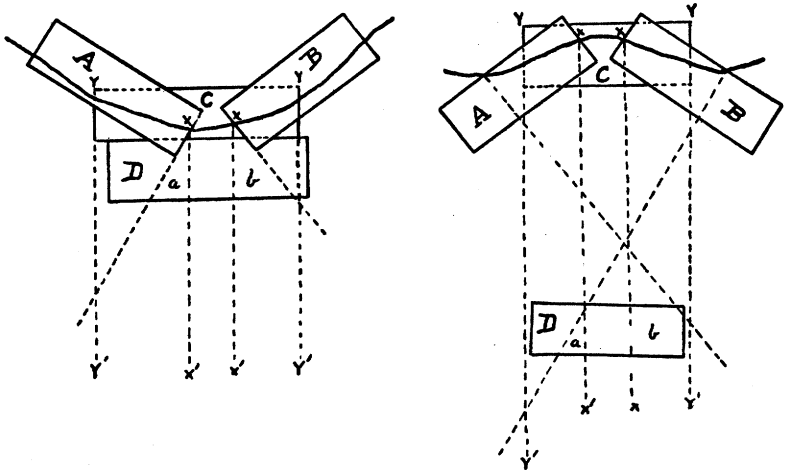
Last Chance claim extending westerly, and the other parallel thereto and starting at the point where the vein leaves the Last Chance and enters the New York claim, as shown on the foregoing diagram." [8] "In other words, . . . the inquiry is not whether the owners of the Last Chance have a right to pursue the vein as it descends into the ground south of the dotted line *r s*, . . . Perhaps the rights of the junior locator below the surface are limited to the length of the vein within the surface of the territory patented to him, but it is unnecessary now to consider that matter. All that comes fairly within the scope of the question before us is the right of the owners of the Last Chance to pursue the vein as it dips into the earth westwardly between the line *a d t* and the line *r s*, and to appropriate so much of it as is not held by the prior location of the New York, and to that extent only is the question answered." [9]

In reaching its express conclusion, however, that the owner of the Last Chance had extralateral rights north of the line *r–s'*, the court considered a question certified to it by the court below, as follows: [10] "May any of the lines of a junior lode location be laid within, upon or across the surface of a valid senior location for the purpose of defining for or securing to such junior location underground or extralateral rights not in conflict with any rights of the senior location?" It is to be observed that this question, in the form in which it was put, was so broad as to permit of an affirmative answer if the court found that a junior locator whose location was marked as indicated had *any extralateral rights whatever* not in conflict with the extralateral rights of the senior locator, or, as stated by the court,[11] "the answer to this question does not involve a decision as to the full extent of the rights beneath the surface which the junior locator acquires. . . . The question is not distinctly presented whether . . . the vein up to the limits of the south end line of the Last Chance, *b c*, . . . belongs to the owners of the Last Chance or not." Therefore, in answering this question affirmatively, the court might, and did, consider the question to be merely as to whether or not a junior locator may lay an end line upon the surface of a senior location for the purpose of securing to himself an extralateral right to so much of the vein only as apexes within the previously unoccupied surface. In other words, in answering this question affirm-

[8] P. 59. [9] P. 85. [10] P. 59. [11] P. 85.

atively, the court decided that a junior locator may lay his end lines upon a senior surface for the purpose of securing to himself extralateral rights — that is, *some* extralateral rights, extralateral rights on at least some of so much of the vein as apexes between his end lines — the senior locator being thereby deprived of no extralateral rights. But, in answering this question affirmatively, the court did not expressly decide that a junior locator may lay his end lines upon a senior surface for the purpose of securing to himself extralateral rights on *all* of so much of the vein as apexes between his end lines, excepting only where a conflict arises with the extralateral rights of the senior locator. That question, said the court,[12] is "for further consideration."

The difference between the holding as made and the proposition as authority for which the case has since been generally but not uniformly cited, is illustrated by the following diagrams:



The express holding in the Del Monte case is in point to establish a right in the owner of location C, in the above diagrams, to the ore under the surface of location D, between the lines x–x': the case has been cited as authority for the proposition that the owner of location C is also entitled, as against the owner of location D, to the ore under the surface of the territory indicated by *a* and *b*.[13]

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[12] P. 86.

[13] Another development of the doctrine enunciated in the Del Monte case should here be noticed for the purpose of preventing its confusion with the proposition under consideration. Thus Lindley (pp. 655–656) states: "It is manifest from a con-

But while it is certain that the Del Monte case is not direct authority for the broad proposition to establish which it is cited — the court going even so far as to say,[14] "Perhaps the rights of the junior locator below the surface are limited to the length of the vein within the surface of the territory patented to him" — it still remains to be considered whether or not the Del Monte case is indirect authority, or authority by necessary implication, to establish that proposition. That is, it remains to be considered whether or not the reasoning of the court in holding that the owner of the Last Chance had extralateral rights north of the line *r–s'* applies with equal force to establish that it also had extralateral rights south of that line; or, in other words, that it had extralateral rights on a segment of the dip of the vein as long as the length of the apex included between the end lines *a–d* and *b–c*, excepting only as those parts on the dip of the vein to which the owner of the New York had extralateral rights; or, still more specifically, that the extralateral rights of the owner of the Last Chance were limited on the south only by the line *r–z* extended to *z'*, and thence westwardly, along the extended line *b–c*, to *c'*. Snyder is clearly of this opinion, for he states:[15] "The court plainly intimates an intention not to restrict this dip right in any manner within common-law principles. But that, since the junior locator, the Last Chance, owns it all within its own end lines, except for the claim of the senior locator, the New York, when those rights [the New York's] have all been satisfied, it [the Last Chance] owns the vein beyond the uttermost plane of interruption, to endless depths."

It is not clear, however, that Lindley is of the same opinion as Snyder. It is true that on page 650 (Figure 31), in seeking to illustrate the principle enunciated by the court in the Del Monte case as to surface conflicts, Lindley draws a diagram which allows, to a junior locator, extralateral rights to all of so much of the

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sideration of the series of decisions handed down by the secretary of the interior . . . that the rule announced by the supreme court of the United States in the Del Monte case . . . did not in terms purport to decide anything more than that a junior locator might, for the purpose of defining an extralateral right not secured by prior location, place his end-lines upon the senior claim. The land department permits the laying of such lines entirely across the senior claim, not only for this purpose, but for the purpose of acquiring surfaces not covered by the older location. . . . We do not conceive that there is any wrong done to anyone by the adoption of this rule." This rule seems to be a perfectly proper and logical development of the doctrine of the Del Monte case: it is to be observed, however, that it has no association with the proposition under consideration.

[14] P. 85.

[15] P. 704.

vein as apexes between his end lines, notwithstanding that part of the apex so included is on a surface belonging to a senior locator.[16] The main question considered by Lindley on page 650, however, is not the question under discussion. The question under discussion is formulated by Lindley, as follows:[17] "Where two claimants locate upon the same vein, . . . a part of the apex being within a surface common to both claims, . . . the junior locator, his location . . . being such as would confer an extralateral right in the absence of any conflict, is entitled to all that part of the vein in depth lying between his extended end-line planes, less the segment which legally falls to the senior locator."[18] And, after considerable discussion of this formula, Lindley reaches the following conclusion (conclusion 9, p. 1077): "Where the extralateral-right planes of two locations conflict, each having a part of the apex of the vein within their respective surface boundaries, the junior locator takes such segment of the vein within his extralateral bounding planes as remains after satisfying the extralateral right of the prior grant." It is to be noticed that no statement is here made as to where the extralateral bounding planes are to be applied, and therefore that Lindley's

[16] Lindley's Figure 31 would as well have illustrated his text had an extralateral-right plane been drawn, parallel to the end lines, from the point where the apex departs from the surface of location D and enters the surface of location B, and an extralateral-right plane so drawn would have accurately illustrated the exact holding of the Del Monte case.

[17] P. 1058.

[18] It seems clear that Lindley did not mean the application of this formula to cover a case where the junior location included no part of the apex whatever which had not been previously located. It is certain that no court would apply this doctrine so far. Thus, in the Copper Trust case, 65 Pac. 1025 (discussed below), the court said: "Suppose, for instance, there had been no vacant surface within the boundaries of the Copper Trust location, would it be contended for a moment that O'Connor has any rights whatever under it? A discovery of a vein upon unoccupied land is absolutely essential to the validity of a location. There must be a surface right. Without this no right to the lode can be established. The statutes do not authorize the land department to convey a lode independently of the surface ground connected with and containing or overlying it. . . . Neither this section [§ 2322, U. S. Stats.] nor any other provision of the statute authorizes or provides a way for the appropriation of any portion of a lode without some portion of the surface through which it may be reached." It is true that, in Del Monte *v.* New York, Hallet, J., in the lower court, said: "I think that the lines of a claim may be located wholly or partly upon other territory, — that is, territory which is not open to location, — for the purpose of determining the extralateral questions" (not reported: quoted from Lindley, p. 657). Clearly, however, Mr. Justice Hallet meant only that any one line might be wholly laid upon the surface of a senior location, not that all the lines of a junior location might be so laid.

conclusion, exactly as stated, is sound, but leaves the question unanswered.

The two Stemwinder cases [19] and the Copper Trust case [20] are discussed at length by Lindley [21] in connection with the holding of the Del Monte case, and so need no extended discussion here. It should be remarked, however, that in the first Stemwinder case the attention of the court [22] seems to have been directed merely to a question as to whether or not the extralateral rights of the owner of the Stemwinder — a junior location having its northerly end line laid upon the surface of a senior location — should be bounded by a plane drawn through the southerly boundary of the overlapped senior location; while in the second Stemwinder case, heard by the same court, the main question was as to the interruption of an extralateral right by a conflicting senior extralateral right. It is true that, in both cases, the court held that the northerly extralateral-right plane of the Stemwinder should be drawn through its northerly end line, notwithstanding that such end line was laid upon a senior surface, but in neither case does the attention of the court appear to have been specifically directed to the exact holding of the Del Monte case, no question having been raised, apparently, as to whether or not the northerly extralateral-right plane of the Stemwinder might not better be drawn, parallel with the end lines, from the point where the apex departed, on the north, from the Stemwinder surface.

In the Copper Trust case, on the other hand, the exact question under discussion was specifically raised and squarely met. The court held that the owner of the Copper Trust location had extralateral rights to only so much of the vein on the dip as he had on the apex (that is, previously unlocated apex), saying: "it was distinctly held [in the Del Monte case] that any of the lines of a junior location may be laid within, upon, or across the surface of a valid senior location for the purpose of defining for or securing to such junior location underground or extralateral rights not in conflict with any rights of the senior location. . . . Nowhere in the opinion do we find any support for the contention that the junior locator acquires any right to any portion of a vein beneath the surface of the senior location by laying his lines upon, over,

[19] Bunker Hill, etc., Co. *v.* Empire State, etc., Co., 109 Fed. 538, 131 Fed. 591.
[20] State *ex rel.* Anaconda, etc., Co. *v.* District Court, 25 Mont. 504, 65 Pac. 1020.
[21] § 596.
[22] Circuit Court of Appeals, 9th circuit.

or across its surface, except that by this means he may secure parallelism of his end lines, and, through this parallelism, extralateral rights to the extent of the length of the vein found within the surface for which he may receive a patent. . . . In the Del Monte Case the extralateral rights claimed by the Last Chance were asserted as to that portion of the vein the apex of which was found within that part of the surface of the Last Chance not covered by any previous location. The case goes only to the extent of deciding that, as the Last Chance had parallel end lines, and the vein passed through them, it had extralateral rights as to that portion of the apex not covered by either of the other conflicting locations." [23]

In Jefferson M. Co. *v.* Anchoria, etc., Co.[24] an excellent opportunity was afforded for discussion of the question under consideration. The facts in the case are illustrated by the following plat: [25]

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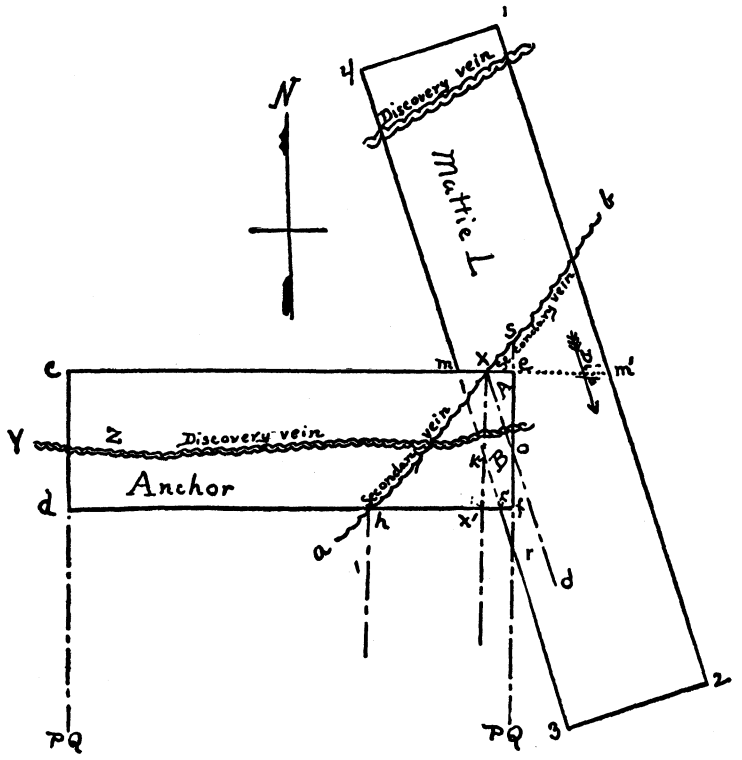
[23] 65 Pac. 1024–1025.

[24] 32 Col. 176; 75 Pac. 1070; 64 L. R. A. 925.

[25] NOTE ON JEFFERSON M. CO. *v.* ANCHORIA, ETC., CO., 32 COL. 176: On the plat which accompanies the opinion in this case, the apex of the discovery vein of the Anchor location is not shown, as here, to have extended, on its easterly course, beyond its point of intersection with the secondary vein. On the other hand, from statements contained in the opinion, it appears that the apex of the discovery vein of the Anchor did in fact cross both end lines of that location, as shown on the plat here given; and that the decision of the court was rendered in contemplation of this fact is shown by its expressed willingness to apply, to this case, the doctrine of Walrath *v.* Champion, 171 U. S. 293 — that is, notwithstanding the fact that the apex of the secondary vein departed from the surface territory before reaching the end line *e–f*, the court was willing to grant rights on the dip of such secondary vein up to such end line, on the ground that such end line was crossed by the discovery apex, and that rights on the secondary vein should be conterminous with rights on the discovery vein.

In this connection it is submitted that Lindley's views as to dip rights on secondary veins (Lindley, §§ 593–594), though he attempts to reconcile Walrath *v.* Champion, are in fact in opposition to the doctrine of that case. If it be permitted to epigrammatize both the doctrine of Walrath *v.* Champion and Lindley's views, the former may be stated thus — so much of the secondary vein as there is of the discovery apex; while the latter may be stated thus — so much of the secondary vein as there is of the secondary apex. Or, to state Lindley's views more fully, he holds that though the discovery apex crosses both end lines, still rights on the dip of the secondary vein must be limited by the extent of the apex of such secondary vein within the surface territory, that is, that the dip-right bounding planes applicable to the secondary vein must be drawn, parallel with the end lines, from the points of departure of the secondary apex from the surface territory. In other words, Lindley measures the extent of the dip rights on a secondary vein by the length of the secondary apex within the surface boundaries, irrespective of the length of the discovery apex; while the court in Walrath *v.* Champion measured the extent of the dip rights on a secondary vein by the length of the discovery apex, irrespective of the length of the secondary



The Anchor was the senior location. The ore bodies in dispute were on the dip of the vein *a–b*, and lay under the surface of the

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apex. It may be observed that Lindley's views are in conformity with, and that the doctrine of Walrath *v.* Champion denies, the principle that, save in so far as a discovery vein serves as a basis of location, no distinction is to be drawn between a discovery vein and a secondary vein, both being of equal dignity.

Now it is clear that if Lindley's views, which are supported by the decision of the Circuit Court of Appeals in Mont. M. Co., etc., *v.* St. Louis, etc., Co., 102 Fed. 430, and 104 Fed. 669, be accepted as correct, the rights on the secondary vein in the Anchor would have been the same whether the discovery vein terminated as indicated on the plat accompanying the opinion, or as indicated on the plat given herewith. That is, if Lindley's views be applied, it appears that if the discovery apex crossed the end line *e–f*, as it did in fact, the bounding plane to limit the rights on such secondary vein must nevertheless be drawn from the point *x;* while if it be supposed that the discovery apex terminated before reaching the end line *e–f* (namely, at its intersection with the secondary vein), such bounding plane must still be drawn from the same point.

It is true that Lindley, in expressing his views, did not have in contemplation a state of facts such as that presented by the supposition that the discovery apex in the Anchor terminated at its intersection with the secondary vein, but such a state of facts was presented to the court in Ajax Gold M. Co. *v.* Hilkey, 31 Colo. 131,

Anchor, within the parallelogram *x–x'–f–e*, less the triangle *k–n–x*.[1] The decision awarded all the ore bodies in dispute to the owner of the Anchor.

It is clear that the lines 4–3 and 1–2, being the lines crossed by the discovery vein of the Mattie L, are the true end lines of that location, and that, for a similar reason, the lines *c–d* and *e–f* are the true end lines of the Anchor. It is clear, furthermore, that in considering what dip rights the owner of the Mattie L had on the vein *a–b* — provided it had any rights thereon at all [26] — the secondary character of that vein is immaterial, for, since it crossed both the true end lines of the location, the bounding planes limiting the dip rights will be the same as if it had been a discovery vein.[27]

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72 Pac. 447, and the holding in that case was in conformity with the statement made above. That is, the doctrine of the Ajax case was specifically to the effect that if the point at which a discovery apex departs from the surface territory is short of the point at which a secondary apex so departs, in such a case the dip rights on the secondary vein are not to be limited by the bounding plane limiting the dip rights on the discovery vein, but are to be limited only by the length of the secondary apex within the surface territory. It is clear that this holding was in exact conformity with Lindley's views.

It is curious to note that Ajax *v.* Hilkey was decided by the same court which decided Jefferson *v.* Anchoria, the case under discussion, both opinions being written by Campbell, C. J. In Jefferson *v.* Anchoria Mr. Justice Campbell intimates that his therein expressed affirmance of the doctrine of Walrath *v.* Champion is to be reconciled with his decision in Ajax *v.* Hilkey, apparently on the ground of the difference in the facts of the two cases, namely, that in Walrath *v.* Champion the point where the secondary apex departed from the surface territory was short of the point where the discovery apex so departed, while in Ajax *v.* Hilkey the contrary was true. It is submitted, however, that the Ajax case may not be reconciled with Walrath *v.* Champion, for the holding of the Ajax case (namely, that ownership of the secondary apex gives dip rights on the secondary vein which are not to be limited by the same bounding planes which limit the dip rights on the discovery vein, the discovery apex being shorter than the secondary apex, can only be based on the theory that the extent of the dip rights on a secondary vein is dependent on the length of the secondary apex; while the holding of Walrath *v.* Champion (namely, that notwithstanding a partial lack of apex, dip rights on a secondary vein may, if the discovery apex be longer than the secondary apex, be conterminous with the dip rights on the discovery vein) can only be based on the theory that the extent of the dip rights on a secondary vein is dependent on the length of the discovery apex.

[26] See last paragraph of footnote No. 27.

[27] "One thing seems quite certain — the law, as at present construed, may compel the inquiry, where two veins are found to exist within a claim, as to which one was discovered first, — that is, which vein was the basis of the location, — and there exists to this extent a distinction between the two classes of veins. In other respects they are of equal dignity" (Lindley, 1051–1052). In other words, where two veins are found to apex within the surface territory of one location, no distinction is to be drawn between them, but both are to be treated as of equal dignity — unless a

No question was raised as to the indubitable right of the owner of the Anchor to the ore to the west of the bounding plane *x–x'*,

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question arises as to some point concerning, or dependent on, the drawing or character of the boundaries of the location, in which event, but in which event only, an inquiry as to which is the discovery vein (that is, as to which vein served as the basis of location) becomes of moment. In the case in hand, if the owner of the Mattie L had any rights whatever on the vein *a–b*, such rights must be determined with reference to the end lines 4–3 and 1–2. And since the same lines would still be end lines, and so would still determine those rights, if the vein *a–b* were considered as a discovery vein, any inquiry as to whether said vein was a discovery or a secondary vein would be, in this connection, of no moment.

In the opinion, in the case in hand, it was stated (64 L. R. A. 928): "It is to be observed again that *a–b* is not the discovery vein of either location, but the parties seem to agree that, under the facts of this case, their respective rights thereto, whether intraliminal or extralateral, are not different from what they would be were both locations based upon it as such."

This statement, in so far as it relates to the Anchor location, is very puzzling. On the one hand, it is clear that the vein *a–b* cannot be considered as the vein with reference to which the Anchor was located without establishing the lines *c–e* and *d–f*, both of which were crossed by said vein, as the end lines of the Anchor location. On the other hand, it is equally clear that it was not the intendment of the agreement to establish said lines as end lines, for so to have done would have been to grant, to the owner of the Anchor, dip rights on the vein *a–b*, which would indisputably have included not only all the ore in controversy but also all other ore, under the surface of the Mattie L location and beyond, which might have been included between vertical planes drawn through the extended lines *c–e* and *d–f*. It is clearly apparent, therefore, that the agreement of the parties as stated in the opinion of the court, cannot be taken literally, and that, in considering this case, the vein *a–b*, though it may be considered as if it were the discovery vein of the Mattie L, may not be considered otherwise than as the secondary vein of the Anchor.

But though the form of the agreement of the parties is inexact, consideration makes its intendment clear. On the one hand, it is evident that counsel for the owner of the Anchor were willing to base their claim of right to the ore in controversy on the supposition that the vein *a–b* was a discovery vein. On the other hand, it is evident that counsel did not mean to alter the true character of the line *e–f* as an end line. Now, in order both to consider the vein *a–b* as the discovery vein of the Anchor, and still to retain the line *e–f* as an end line, it would be necessary incidentally, though only incidentally of course, to reconstruct the course of the apex. Thus, for the purpose of giving effect to the agreement of the parties, the apex of the vein *a–b* on its westerly course might be assumed to cross, let us say, the end line *c–d*. As has been pointed out, said apex may not be considered, for the purpose in hand, as crossing both the lines *c–e* and *d–f*, or the line *c–e* and no other line. It may not be assumed not to cross, on its easterly course, the line *c–e*, for every question in the case hangs upon the fact that, on its easterly course, it does cross the line *c–e*, at *x*. The only assumption that can be made, therefore, is that the vein *a–b*, on its westerly course, either crosses the line *c–e* a second time or crosses the end line *c–d*.

Thus it becomes clear that the intendment of the agreement of the parties was to the effect that though the vein *a–b* was in fact a secondary vein, yet the rights of the owner of the Anchor thereon, in reference to the ore in controversy, were not different from what they would have been if said vein had been a discovery vein having such a course on its westerly strike that the rights thereon might have been determined with

drawn, parallel with the end lines, from the point where the apex of the vein departed from the surface territory of the Anchor.[28] No question was raised, either, as to the right of the owner of the Mattie L to the ore under the surfaces of the triangles *r–n–f* and *s–x–e*, though it is submitted that, under the doctrine of Walrath *v.* Champion, the owner of the Anchor might have claimed a right not only to sink on the vein, into the territory *r–n–f*, but even to rise, up the dip of the vein, into the territory *s–x–e* — excepting the surface.

The only territory remaining for consideration is that indicated

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reference to the end line *e–f* as an end line — that is, the agreement of the parties was merely an affirmation of the soundness of the principle that, apart from questions concerning boundaries, an inquiry as to whether a vein be secondary or discovery is of no moment. Or, more specifically, counsel for the owner of the Anchor claimed no greater rights on the vein *a–b*, because of its secondary character, than would have resulted to them had the vein *a–b* been a discovery vein crossing, on its westerly course, let us say the line *c–d*.

Now let us consider the effect of this agreement. On the one hand, if the vein *a–b* be considered as a discovery vein (having such a course on its westerly strike that the line *e–f* may be treated as an end line), in such case the owner of the Anchor must clearly be denied all dip rights on said vein to the east of the plane *x–x'* (Lindley, § 591), and all common law rights thereon to the east of the plane *x–o'* (Del Monte case). On the other hand, if the vein *a–b* be considered as a secondary vein (in which case its course on its westerly strike is immaterial), in such case a doubt as to the rights to the ore within the triangle *x–o–e* would be raised in favor of the owner of the Anchor by the doctrine of Walrath *v.* Champion, for the application of that doctrine would give rights on the secondary vein conterminous with the rights on the discovery vein *Y–Z*, that is, up to the end line *e–f*, and including the triangle *x–o–e*. It is true that it appears from the opinion of the court that the owner of the Anchor in fact laid claim to all the ore within the parallelogram *x–x'–f–e*, including the triangle *x–o–e*, but the agreement to consider the vein *a–b* as the discovery vein of the Anchor was, in effect, an abandonment of that claim, and a waiver of the doctrine of Walrath *v.* Champion.

It is to be observed, further, that the agreement to consider the vein *a–b* as the discovery vein of the Mattie L was, in effect, an abandonment of another contention made by the owner of the Anchor. Such contention appears to have been to the effect that the owner of the Mattie L had no right whatever to the vein *a–b*, because ownership of this vein (in the Mattie L) could be predicated only on ownership of the discovery vein to the north, — the vein with reference to which the boundaries of the Mattie L must be determined, — and because the apex of the vein *a–b* lay more than three hundred feet distant from the course of the apex of such discovery vein, and so could not be included within that extent of surface territory on each side of the lode line, which, under the statute, may be patented as one location. This contention, of course, was based wholly upon the consideration of the vein *a–b* as a secondary vein. The court did not pass upon this contention.

[28] The court saying: "The owner of that claim . . . certainly owns all the mineral of such vein within planes extended vertically downwards coincident with its end lines and side lines to the extent at least of the length of the apex found within its surface boundaries." 64 L. R. A. 932.

on the plat by *x–e–o–f–n–k*. The owner of the Anchor could not base a claim to the ore within this territory upon ownership of an apex,[29] for its apex rights were bounded on the east by the plane *x–x'*. Being the owner of the senior location, however, and therefore the owner of all surfaces in conflict with the junior location, it could claim a common-law right to all ore within this territory to which the junior locator had no apex rights. Apparently, then, the whole controversy should have turned, as in the Copper Trust case, upon a determination of a question as to whether or not the junior locator had so located the apex of the vein as to give him rights on the dip thereof within any part of the territory under consideration.[30]

The territory *x–e–o–f–n–k* is divisible into two parts — the triangle A, and the pentagon B.. Both the triangle A and the pentagon B, it is to be observed, are included within the territory of surface conflict of the two locations, yet they are to be distinguished.

The triangle A lies to the east of a bounding plane (*x–o–o'*) which may be drawn, parallel with the end lines of the Mattie L, from the point where the apex departs, on its westerly course, from the surface territory of that location. That is, the owner of the Mattie L is the undisputed owner of the apex to the east of the point *x*, wherefore, under the rule that a junior locator on the apex, provided his location is regular, is entitled to so much on the dip as he has on the apex, even though the vein dips under the surface of a senior location, the owner of the Mattie L would seem to have been clearly entitled to follow the dip of the vein, within and without the territory underlying his surface, everywhere between his dip-right bounding planes, including the triangle A.

Toward the end of the opinion the court said: "The case has not been argued, certainly not exclusively, upon the proposition that each of these parties owns a definite portion of the ore found within the parallelogram, *c, f, e, x*, to each belonging such part of the vein as it has the apex of, but, if it had been, there are not sufficient *data* in the record to show what portion, or how much, each party is entitled to, even if we should hold that the Mattie L. owns such portion of the ores within that parallelogram as it has the apex of easterly of *x*. The case has been submitted rather upon

[29] Except under the doctrine of Walrath *v.* Champion, 171 U. S. 293.

[30] The line of reasoning actually followed by the court will be discussed in Part II of this paper, — Intralimital Rights in Lode Locations.

the proposition that each party owns all the ores found within this parallelogram." Thus it appears that the court proceeded upon the ground that since no distinction had been drawn by counsel between the triangle A and the pentagon B, these two territories should be considered as one, and that since, under any circumstances, the owner of the Mattie L could be entitled to only a small part of such territory, the whole thereof should be awarded to the owner of the Anchor. Whether or not the court was justified, since each party demanded the whole territory, in refusing to consider, of its own initiative, the respective rights of the parties therein, is a question of no importance in this discussion, but the fact that the court expressed a willingness to have considered a distinction between the territories herein indicated as the triangle A and the pentagon B, had such a distinction been made, intimating that it might have granted apex rights in the former, while denying them in the latter, to the owner of the Mattie L, is very significant.

The pentagon B lies to the east of x–x', the easterly dip-right bounding plane of the Anchor on the vein a–b. Except under the doctrine of Walrath *v.* Champion,[31] therefore, the owner of the Anchor might not claim apex rights to the ore within the pentagon B. Now, as has been stated, since the owner of the Anchor had no apex rights on the vein a–b, to the east of the plane x–x', it follows that it might claim the ore within the pentagon B only on the ground that it had a common law right thereto, being the owner of the surface. This common law right, of course, could be operative only in the absence of an apex right in the owner of the junior location. Now the only theory on which the owner of the Mattie L might claim apex rights within the pentagon B, would be that the effect of the decision in the Del Monte case is that a junior locator, by laying his lines across a senior surface thereby acquires apex rights, secondary only to the apex rights of a senior locator, to so much of the vein as apexes within his boundaries, notwithstanding that part of the apex so included outcrops on a surface belonging to a senior locator. In other words, under the theory as authority for which the Del Monte case has been cited, the owner of the Mattie L might have claimed apex rights on the vein a–b, to the west of the point x, on the ground that its boundaries included a part of the apex to the west of the

[31] *Supra.*

point x — therefore that the owner of the Mattie L had apex rights everywhere to the east of the line 4–3, save where the superior apex rights of the owner of the Anchor took precedence; that the apex rights of the owner of the Anchor were bounded on the east by the plane x–x' — therefore that the owner of the Mattie L had apex rights everywhere to the east of the planes x–x' and 4–3. It appears from the opinion that this claim was virtually made by counsel for the Mattie L as follows: "The second contention of appellant is that . . . the owner of the Anchor . . . may follow the secondary vein, a–b, between vertical planes drawn parallel to the planes of the end lines, . . . at any point west of x, but . . . the owner of the Mattie L. claim . . . has the right to follow such vein on its dip between vertical planes drawn parallel to and coincident with the legal end lines (that is, the located side lines) of the Mattie L. location, and this includes the vein under the surface of the Anchor within" the territory in question. Commenting on this claim, the court said: "counsel virtually asks to have the principle of that rule [the doctrine of 'extralateral' (that is, apex) rights] applied to the facts. That doctrine does not fit the facts of the case, for the legal question is one strictly of intraliminal [that is, common-law] rights." Thus the court denied apex rights to the owner of the Mattie L within the pentagon B, and to that extent this case denies the doctrine for which the Del Monte case has been cited as authority, and limits the effect of the Del Monte decision to the exact holding of the court. This being understood — that is, it being understood that all claims of apex rights within the pentagon B were disallowed by the court — the decision that the sole question in the case was one of "intraliminal" rights, wherefore the senior locator of the surface of conflict must prevail, becomes clear and of full force.

It is true that this case might have been similarly decided under the doctrine of Walrath *v.* Champion, but inasmuch as counsel for the Anchor virtually waived all claims of right under the rule of that case,[32] and inasmuch as the court, though it incidentally expressed its willingness to comply with that rule,[33] did not apply it, but rendered the decision on other grounds, the force of the decision as a refusal to extend the doctrine of the Del Monte case is not weakened.

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[32] See next to last paragraph of footnote No. 27.

[33] The court said: "if this case demanded the application of that rule it would be our duty to follow it . . . notwithstanding the adverse criticism of the decision by the learned author of Lindley on Mines." 64 L. R. A. 931.

But if it were granted that the holding in Jefferson *v.* Anchoria is not of great force to restrict the extension of the doctrine of the Del Monte case, at least the argument of the Montana court, in the Copper Trust case,[34] is, and there seems to be no case which definitely establishes the extension of that doctrine. It is true that the two Stemwinder cases and the Hidee case[35] apparently favor such an extension. It is true, furthermore, that Walrath *v.* Champion would seem to furnish authority, by analogy, for such an extension, for in that case the Supreme Court seems to have decided that, as to a secondary vein, a locator may follow its dip between the planes of his end lines, even though the length of the apex of the secondary vein within his territory be less than the distance between his end lines, in other words, that, as to a secondary vein, a locator may have more on the dip than he has on the apex. But if that be indeed the holding of the court in Walrath *v.* Champion, and this is energetically denied by Lindley, it has at least been shaken by the almost universal adverse criticism of jurists, and by the fact that it was not followed, in a later decision by the Circuit Court of Appeals, in Montana M. Co. Ltd. *v.* St. Louis M. & M. Co.[36] It may fairly be stated, therefore, that the extension of the doctrine of the Del Monte case has not been definitely established by the cases.[37] The writer has not discovered any case, other than those herein above cited, wherein there is any valuable discussion directly bearing on the question under consideration—it being submitted that those cases which treat of the apex rights to be acquired by the laying of lines across the surfaces of senior agricultural patents, or other lands not located as lode claims, are not in point.[38]

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[34] *Supra.*

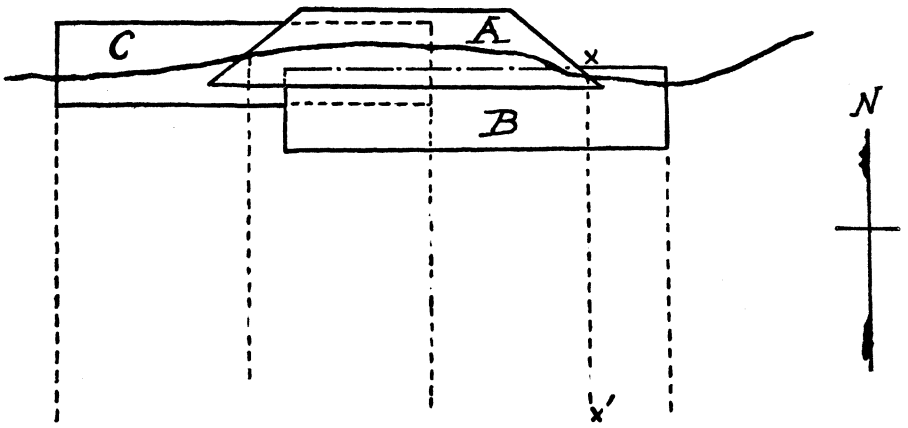
[35] *In re* Hidee Gold M. Co., 30 L. D. 420.

[36] 102 Fed. 430, and 104 Fed. 664. Lindley, 1048, states as follows: "In the preceding section we have fully explained what we understand to be the proper interpretation of the decision of the circuit court of appeals in the Walrath case, from which it appears that no such deduction as claimed can be made. The fact that the same court in the St. Louis case did not apply any such doctrine as that above suggested is a circumstance of the highest corroborative value supporting our view that the decision in the Walrath case was never intended to sanction any such doctrine. If it had, it would have followed it, and it would have been in duty bound to do so, as it had received the approval of the supreme court of the United States. As it is, the court of appeals cites the Walrath case as authority for its decision in the St. Louis case, as it undoubtedly is."

[37] "It is better that the principle established should be certain and definite, even if it is not based upon incontrovertible logic or the perfection of human reasoning." Lindley, 1078.

[38] See above, last paragraph of footnote 6.

The reasoning on which the court in the Del Monte case based its decision was, in brief, that surface conflicts, because of many natural as well as practical causes, are in no wise to be avoided, and are not only not forbidden but are even contemplated by the statute, wherefore, since a senior locator is deprived of no property right by having the lines of a junior location laid upon his surface, there is no reason why a junior locator should not make a peaceable entry for that purpose, thereby paralleling his end lines and securing extralateral rights, of which he would otherwise be deprived, to so much of the vein as is referable to that portion of the apex which lies within his own undisputed territory. That the court did not believe that this reasoning would also apply necessarily to establish the further proposition for which the case has since been cited as authority (namely, that there is no reason why a junior locator may not lay his end lines across a senior surface for the purpose of securing apex rights referable to that portion of the apex which lies within the senior location), is evidenced by the statement of the court that that proposition was one reserved "for further consideration."



The argument of the court to the effect that A, a senior locator, is in no wise injured by permitting C, a junior locator, to draw an end line upon the senior location for the purpose of securing such extralateral rights as are not incident to ownership of A's location, does not necessarily contemplate the exercise by C of extralateral rights greater than may be referred to that portion of the apex which lies within his own undisputed territory — otherwise the

question of the court,[39] "Certainly, if the rights of the prior locator are not infringed upon, who is prejudiced by awarding to the second locator all the benefits which the statute gives to the making of a claim?", might easily be answered if B, a locator on the dip, senior to C, whose territory is not subject to the extralateral rights referable to C's part of the apex, might be deprived of his common law rights. This is illustrated by the diagram on page 285.

Referring to this diagram, it is clear that A, because of the wide divergence of his end lines, can have no extralateral rights. If, to avoid any question as to the validity of B's location, it be supposed that a part of the apex lies within its surface boundaries, it is equally clear that B, before any location made by C, had a common law right to the ore under his surface, to the west of the plane x–x', for, whatever the nature of a common-law right, at least it must become a vested right to the ore to which it is applicable after every part of the apex to which such ore can be referred has been so located as not to carry dip rights to such ore. Can C, then, by a subsequent location of an apex already located, deprive B of his vested common-law right? Surely not, if the court in the Del Monte case was right when it stated:[40] "The location, the mere making of a claim, works no injury to one who has acquired prior rights."[41]

To the argument that some method of appropriating the whole of a vein must be devised where the location of the apex has been of such a nature or fashion as to leave a certain portion of the vein unappropriated on its dip, it may be answered that this may properly be done by making locations over the unappropriated portions of the dip. It may be urged that the ownership of some portion of an apex is essential to the validity of the location, and that an apexless location over the dip is therefore invalid, but it is submitted that this is error. The statute does not require the discovery of an apex, but the discovery of a vein, — "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."[42] It is not submitted that the discovery of a vein, on its dip, will validate an apexless

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[39] P. 84. [40] P. 74.

[41] A common law right to a given body of ore, prior to location, by another, of an apex to which such ore can be referred, can, at most, be only an inchoate right subject to defeasance upon condition that such apex be so located as to carry dip rights to such ore.

[42] § 2320.

location [43] if the part of the vein so discovered is referable to some part of the apex, but that, if the apex has been so located that that part of the dip of the vein which has been discovered in the apexless location cannot be referred to any part of the apex (that is, does not lie between the extralateral-right planes which may be applied to any location on the apex), there would seem to be no reason why such a discovery of valuable mineral-bearing rock in place should not be sufficient to validate the location.[44] There have been many decisions granting, to the owners of apparently apexless locations, the right to such ore under their surfaces as is not subject to the extralateral rights of locations on the apex — as in Del Monte *v.* New York, where it was expressly held that, as against the owner of the New York, the owner of the Del Monte had a right to the ore under its surface, north of the line r–s'; also as in the Copper Trust case; and the Horseshoe case.[45] It may be that, in each of such cases, the location on the dip contained some portion of some apex other than the apex of the vein in question, but, if so, it does not so appear in the opinions.

To the objection that the making of apexless locations over the dip would be a cumbersome process, and might be entirely impracticable in cases where the dip of the vein is so sharp as to acquire much depth within a short distance from its apex, it may be answered first, in the words of Lindley used in another connection,[46] that this is only "the suggestion of a mere inconvenience to the

[43] No reference is had, of course, to tunnel locations.

[44] Lindley's statement (pp. 532–533), "No lode location is valid unless it includes, to some extent at least, . . . the top, or apex, of a discovered vein," is modified by the concluding clause, "at least as against a subsequent locator properly inclosing such apex within his surface boundaries." Lindley states further: "It is possible that under some circumstances a location overlying the dip of a vein may be valid to the extent of whatever may be found within the vertical bounding planes" (footnote, p. 533). And again (p. 661): "The existing laws require that the top, or apex, of the vein, to some extent at least, should be found within the limits of the location, as defined on the surface, at least as a condition precedent to the enjoyment of the extralateral right. We do not feel justified in asserting that a location on the dip of the vein which does not include any part of the apex is under all circumstances void. It might happen that the true apex of a vein is embraced within a prior grant of such a character as to prevent the owner from following the vein on its downward course out of his vertical boundaries. . . . Under such conditions it is quite possible that by a surface location not covering the true apex the locator might acquire the exclusive right to the surface and the underlying vein as against all persons save those who fortuitously covered the true apex in such a way as to confer upon them the right to laterally pursue the vein underneath the surface of the claim overlying the dip."

[45] Iron Silver M. Co. *v.* Elgin M. Co., 118 U. S. 196.

[46] P. 1068.

junior locator and not a limitation upon his title"; second, that this method has been found to be practicable in Mexico; and third, that this method could hardly be so cumbersome as to relocate the same part of the apex again and again for the purpose of securing rights to ore under surfaces at long distances.

The exact holding of the court in the Del Monte case, and the doctrine for which that case has been cited as authority, are two propositions of entirely different natures. The first merely affords a means of acquiring extralateral rights, where otherwise there would be none, based on ownership of a previously unlocated part of an apex; the second seeks to give double extralateral rights, or extralateral rights in two different directions from one and the same part of an apex. The second proposition, as has hereinabove been stated in a different connection,[47] seeks to give to one who has not located, and who is not the owner of, a given part of an apex, an extralateral right which can properly be based only on ownership of such part of the apex — it seeks to give, to A, extralateral rights referable to a portion of an apex which is not included within A's territory, notwithstanding that such portion of the apex has previously been located by B, simply because B follows the dip of the vein in a direction different from that followed by A. The same reasoning that would disallow extralateral rights to a junior locator on any part of a vein which does not apex at all in any part of his undisputed territory would seem with equal certainty to disallow him extralateral rights on so much of the vein as apexes within territory previously located. If it be granted that the right to pursue a vein on its dip must always be predicated on ownership of an apex, how can a right on the dip of a vein be granted to one who does not own a corresponding part of the apex? Would not this be to violate the elementary rule that a locator can have no more of the dip than he has of the apex? It would seem that when a given part of an apex has once been duly located, it is not, except in case of abandonment, subject to relocation for any purpose whatever. The proposition for which the Del Monte case has been cited as authority, therefore, virtually seeks to grant extralateral rights without ownership of an apex, and so denies the statute, and cannot be law.

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[*To be continued.*]

[47] See above, footnote 6.